mf

EMPLOYMENT TRIBUNALS

Claimant: **Dr Sara Ajaz**

Respondent: **Homerton University Hospital NHS Foundation Trust**

Heard at: **East London Hearing Centre (Open) by video (CVP)**

On: **15 March 2022 – Reserved decision (in chambers)**
23 March 2022 and 12 April 2022

Before: **Employment Judge Elgot**

Representation

Claimant: Mr S Brittenden, counsel

Respondent: Ms B Criddle, counsel

The Employment Judge having reserved her decision now gives judgment as follows:-

JUDGMENT AT A PRELIMINARY HEARING

1. The application by the Respondent to strike out each of the conjoined claims in case numbers 3204536/21 issued on 25 May 2021 and 3205965/21 issued on 17 September 2021 SUCCEEDS on the ground that the Claimant is estopped from bringing the claims and a Tribunal has no jurisdiction to hear them.

2. It has therefore not been necessary to determine the Claimant's application to amend the Grounds of Claim in case number 3204536/21.

REASONS

1. I had the benefit during this preliminary hearing, held remotely by video, of hearing detailed written and oral submissions on the primary applications from both counsel. This open preliminary hearing to consider strike out was ordered by Employment Judge Klimov on 29 November 2021 before whom the Respondent's

argument that the claims in these proceedings have already been finally compromised and/or that they have no reasonable or little prospect of success was rehearsed.

2. As a result of a very recent EAT decision by HH Judge Auerbach named Clark v Middleton (1) and Black Dog Hydrotherapy Ltd (2) [2022] EAT 31 (the Clark case) which was brought to my attention by the Respondent's solicitor on 23 March 2022, the date of promulgation by the EAT, I invited both parties to send supplementary submissions to me about the significance of this appellate authority no later than 30 March 2022. I considered it only fair that both parties should have the opportunity to consider this case and its possible implications in these proceedings. That deadline was extended to 6 April 2022 with my consent. I am grateful to both counsel for sending helpful additional legal comments.

3. There is an agreed preliminary hearing bundle sent electronically consisting of 352 pages. In accordance with the usual practice of the Tribunal I read only those documents to which I was specifically referred in the witness statement and by the representatives.

4. There was a witness statement on behalf of the Respondent made by Mr M Uddin the Information Governance and Freedom of Information (FOI) Officer at the Respondent Hospital who did not give evidence in person and was not available to be cross-examined. I read and took into account his evidence which is signed and dated 3 February 2020 but it has not ultimately been relevant to my decision.

5. The Claimant is, since April 2009, a Specialty Doctor working in the area of bariatric surgery and has been employed by the Respondent since July 2005. She is in some documents referred to as Dr 16223. She is currently subject to an internal capability finding that she has not reached the necessary standard of skill for her role and the PPA (Practitioner Performance Advisers) have declined to carry out its own separate assessment. An appeal was unsuccessful.

6. The second and third claims. The application dated 16 December 2021 by the Respondent in these conjoined cases ('the second and third claims') is that all of the claims should be struck out as a vexatious abuse of process and/or on the basis that they have no reasonable prospect of success and/or that it is no longer possible to have a fair trial in respect of them. Alternatively, a deposit order is sought.

7. In both cases the Claimant makes one claim under section 47B Employment Rights Act 1996 that she has been subjected to detriments arising from acts and/or omissions of the Respondent done on the ground that she made disclosures qualifying for protection as defined in section 43B of the 1996 Act. It is axiomatic that unless a concern about possible wrongdoing in the workplace actually amounts to a qualifying disclosure then the detriments alleged to be consequently suffered by the Claimant cannot be said to be done on '*the ground of*' her disclosures (in the public interest) as defined by section 43B.

8. Ms Criddle on behalf of the Respondent makes the robust argument that the Claimant is estopped from bringing the second and third claims because they rely upon alleged qualifying protected disclosures ('the Original Disclosures') which are the same

disclosures relied upon by the Claimant in an earlier 2017 claim under case number 3200366/17 against the same Respondent ('the first claim').

9. The estoppel arises the Respondent says not least because a prerequisite of any claim under section 47B is an initial finding by a Tribunal that the relevant disclosures do qualify for protection (section 43B). Ms Criddle calls this '*an essential ingredient'*. She argues '*whether the Claimant had made protected disclosures was a necessary-indeed an essential- ingredient in her first claim'*.

10. No evidence or argument was heard in the first claim and no judicial determination was made on the viability of this 'essential ingredient'. The Respondent's estoppel argument is that the judicial dismissal, upon withdrawal by the Claimant, of the first claim on 21 February 2018 is enough to stop her from not only pursuing the allegations of detriment in the first claim but also from returning to any argument about the pre-requisite status of the Original Disclosures as qualifying for protection. I accept of course that it is not necessary to demonstrate a reasoned decision on the issues of fact and law before the estoppel principle can 'kick in' – any judicial decision is enough and in the first claim there was a Rule 52 judgment as described below.

11. Ms Criddle summarises it this way in paragraph 22 of her supplementary submission:-

> '*Fundamentally, the effect of the Claimant withdrawing her claim and it being dismissed on withdrawal was to bring that claims and all its constituent necessary elements to an end. The Claimant cannot therefore revive the issue of whether she has made protected disclosures in these proceedings, that being a necessary constituent element of the first claim which gives rise to issue estoppel'.*

12. I agree with this analysis and find that the Claimant is estopped from her second and third claims. Those claims argue new detriments but they derive from the same source i.e. the Original Disclosures in the first claim which has been dismissed upon withdrawal by the Claimant.

13. I am also certain that the COT3 Agreement signed by the parties effectively compromised the first claim and prevented the second and third claims; I make further findings about the COT3 below.

14. I cannot agree with Mr Brittenden's argument on behalf of the Claimant that she is now bringing different proceedings involving different complaints because there are new and subsequent detriments which have been alleged. But which are said to be done on the ground of the Original Disclosures.

15. History of these claims. In her first claim lodged on 20 April 2017 the Claimant relied upon nine protected disclosures made between July 2011 and December 2016 which she says qualified for protection. Both parties refer to these as the 'Original Disclosures'. The Respondent did not accept that any of those disclosures save perhaps one (it is not quite clear) qualified under section 43B. It disputed all the alleged detriments in the first claim which were said to have occurred on the ground of the Original Disclosures.

16. The Claimant does not say in the second and third claims that she has made any additional protected disclosures. She relies on the Original Disclosures some of which were made over ten years ago. She asserts that she has been subjected to new detriments done on the ground of the Original Disclosures. Those new detriments are set out in paragraph 37 (a) to (i) of the Amended Grounds of Claim in case number 3204536/21. The amendments were sought on 7 February 2022. Further detriments are described in paragraphs 12-13 of the Grounds of Claim in case number 3205965/21.

17. No determination of any of the issues in the first claim was made by an Employment Tribunal and there were no findings of fact because after an initial reading day but before any evidence was formally adduced the parties settled, the claim was withdrawn, and on 21 February 2018, Employment Judge Brown promulgated a short judgment which reads,

> '*The proceedings are dismissed following a withdrawal of the claim by the claimant'.*

This is clearly a judicial decision.

18. The Respondent for obvious reasons was convinced that the first claim was irrevocably and finally settled and had come to an end. If interrogated at the time of the withdrawal and dismissal it would no doubt have expressed its understanding that the proceedings in the first claim could not in any way be brought again because of the terms of the COT3 and as a result of estoppel. I am obliged to undertake an objective reading of the meaning and effect of the withdrawal and dismissal rather than look at the subjective intentions of the parties in 2018 (and Clark confirms this approach) but, by way of background context it is clear that each party sought to draw a line under the first claim without reserving any particular issue. There are no documents in the bundle to suggest otherwise.

19. The judgment of 21 February 2018 is made under Rule 52 of the 2013 Rules. The relevant wording of Rules 51 and 52 reads as follows:-

> ***Rule 51 End of Claim***
>
> *Where a claimant informs the Tribunal either in writing or in the course of a hearing that a claim or part of it is withdrawn, the claim, or part, comes to an end.*
>
> ***Rule 52 Dismissal following withdrawal***
>
> *Where a claim, or part of it, has been withdrawn under rule 51 the Tribunal shall issue a judgment dismissing it (which means that the claimant may not commence a further claim against the respondent raising the same or substantially the same complaint).*

> Mr Brittenden, on behalf of the Claimant, argues that she is not raising the '*same or substantially the same complaints'* in the second and third claims because the alleged detriments are *plainly different'*.
>
> First, Rule 51 refers clearly to the ending of any claim which is withdrawn. I am satisfied, as stated above, that the claims in the first claim have two inextricably inter-linked components (the qualifying disclosures and the consequent detriments). The claims consisting of both components have come to an end under Rule 51. Consequently, the withdrawal under Rule 51 means that a mandatory judgment under Rule 52 prevents a further claim, consisting of both such necessary components, from being lodged.
>
> The public policy considerations referred to at Claimant's counsel's submissions in paragraph 11 are important ones. However, I am conscious that a claimant can and may make new (or renewed) disclosures about what she believes to be ongoing public interest concerns where she also believes that she has suffered detriment as a consequence. She has the agency in this respect. Paragraph 10 of the COT3 permits her to do this – see below.

20. The COT3 Agreement. The parties signed what is called a 'COT3' agreement. I have seen a copy signed and dated by the Claimant on 6 March 2018 and by the Respondent on 12 March 2018. Both parties were legally represented. It records a settlement reached as a result of an ACAS conciliation on 21 February 2018. A COT3 agreement has effect under section 203 Employment Rights Act 1996 to dis-apply the restrictions on contracting out of the right to bring proceedings under the 1996 Act. Again, the signing of the COT3 shows that the parties anticipated that the first claim was ended.

21. The relevant provision in paragraph 4 of the COT3 promises that the Claimant will not (subject to the paragraph 7 proviso – this is a mis-print and should read paragraph 8):

> '*reactivate by any process whatsoever the issues/complaints in the Proceedings [case number 320366/17] or issue any further and/or new claim or claims of any nature against the Respondent or any of its current or former officers or employees in any forum arising from or in relation to the issues/complaints in the Proceedings or her employment to the date of this Agreement'.*

22. I find that paragraph 4 has such effect that it would be an abuse of process if the Claimant, even if not estopped, were permitted to re- litigate the first claim and in particular to re-litigate the issue as to whether her Original Disclosures qualify for protection.

23. The Respondent agrees in return that it will amend an Action Plan dated 30 January 2017 aimed at the re-skilling of the Claimant and there is detailed wording in paragraph 5 of the COT3 which sets out exact details of the amendments to the Objectives of the Action Plan which are agreed in return for withdrawal of the first claim.

24. In brief, part of the second claim is that the Claimant has been subjected to detriment because she says that the Action Plan was not properly implemented according to the Objectives. She has not so far as I am aware sought to enforce the COT3 Agreement and obtain remedy by means of any breach of contract claim.

25. Paragraph 8 again uses the phrase '*full and final settlement of the Proceedings and any other claims anywhere in the world she may have and howsoever arising in connection with her employment up to the date of this Agreement* (my emphasis). Mr Brittenden's contention on behalf of the Claimant that paragraph 8 envisages that she may make further claims after the date of the 'Agreement' is correct but I am satisfied that those further claims cannot be ones which rely on the Original Disclosures because, at the risk of repetition, the disclosures and the question of whether they qualify for protection are an integral part of the first claim which has been 'ended' and settled by the COT3. It is not sufficient that the second and third claims simply post-date the COT3.

26. Paragraph 10 preserves the Claimant's right to make further public interest disclosures and/or to raise concerns about patient safety and care '*with regulatory or other appropriate statutory bodies pursuant to her professional and ethical obligations'.* It makes no reference to the right to bring further proceedings in the employment tribunal about any of the matters set out in paragraph 4. Paragraph 10 simply reserves, in accordance with sensible public policy as well as protection of the individual claimant, that if she discovers additional matters of concern over and above the original Disclosures, she is entitled to raise them and it is still open to her to do so (subject to jurisdictional time limits). I agree with the original submissions made by Ms Criddle at her paragraph 15 in this respect.

27. Section 43J of the 1996 Act is not relevant to the issues at this preliminary hearing.

28. It was reasonable and sensible for the Respondent's solicitor to send me the EAT decision in Clark. The case confirms that a judgment dismissing the claims upon withdrawal has an all -encompassing effect in the absence of any document to the contrary. There is what HH Auerbach calls a '*clean sweep of everything arising in the proceedings against the respondent'*. In the Clark case this included the potential right to receive compensation under regulation 15 (8) TUPE Regulations 2006 from the Second Respondent (R2) even where there was no direct claim by the Claimant against R2. I am satisfied that this means a clean sweep of each and all of the constituent parts of a detriment claim under section 47B including the requirement for disclosures to qualify for protection. Mr Brittenden argues that Clark is not directly relevant to a case such as this one where, after withdrawal and dismissal, there are subsequent proceedings under different claim numbers but for the reasons stated above I do not conclude that the Claimant in these proceedings is bringing an entirely new and different complaint in the second and third claims.

29. In all the circumstances of this preliminary hearing and after due consideration I agree to grant the Respondent's application to strike out the claims. I have not considered, because it is unnecessary for my decision, whether the claims or any part of them have any reasonable prospect of success or whether a deposit order should be

made because there is little reasonable prospect of success (Rules 37 and 39). However, I do appreciate the detailed and expert assistance given by counsel's submissions in this respect.

Employment Judge Elgot

Date 14 April 2022